



**US Army
Corps of Engineers**

Norfolk District

May 26, 2005

PROPOSED NORFOLK DISTRICT REGIONAL PERMIT (RP-05) FOR CONSTRUCTION OF SMALL IMPOUNDMENTS

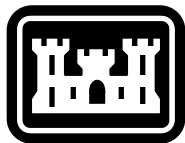
The final nationwide permits were reissued by the U.S. Army Corps of Engineers on 15 January 2002 and published in Part II of the Federal Register (67 FR 2020). The Federal Register notice is available on the Internet at:

<http://www.usace.army.mil/inet/functions/cw/cecwo/reg/2002nwps.pdf>

The nationwide permits address agricultural activities (NWP 40) and recreational activities (NWP 42). The Norfolk District has found that there are many small agricultural and recreational impoundments and other types of small ponds typically proposed that do not clearly satisfy these permits. Therefore, the district proposes a regional permit for small impoundments associated with farming, recreational or other activities. These activities, with appropriate conditions, have minimal adverse effect on the aquatic environment, both individually and cumulatively, and therefore qualify for a general permit under section 404(e) of the Clean Water Act.

The Corps invites comments on this proposed regional permit (RP-05). Comments should be submitted to the Norfolk District Army Corps of Engineers, ATTN: Regulatory Branch, 803 Front Street, Norfolk, Virginia, 23510-1096. Comments are due by June 26, 2005.

J. Robert Hume, III
Chief, Regulatory Branch



**U.S. Army Corps
Of Engineers**
Norfolk District

05-RP-05

Authorized Activities: Construction of small agricultural and non-agricultural impoundments in certain waters of the United States, except urban storm-water management ponds (BMPs).

The people of the Commonwealth of Virginia are hereby authorized by the Secretary of the Army and the Chief of Engineers pursuant to Section 404 of the Clean Water Act (33 U.S.C. 1344) to discharge dredged and/or fill material into non-tidal waters of the United States, including most non-tidal wetlands for the construction of certain small impoundments.

The intent of this authorization is to allow the public to construct small impoundments for general farm use, such as irrigation, livestock watering, fire prevention, etc., recreational use, and other uses in non-tidal waters of the United States, including most non-tidal wetlands, provided they have only a minimal environmental impact. This permit would also authorize facilities referred to by the Natural Resources Conservation Service (NRCS) as Converted Wetlands for Non Agricultural purposes (CWNA) or Best Management Practices (BMPs).

The activities authorized under this permit include all aspects of pond construction such as land clearing, berm construction, placement of water control structures and spillways, flooding, etc. These authorized activities are subject to limits and standards contained in the special conditions (pages 3-6 below) and general permit conditions (attached). All work undertaken outside the following conditions, standards, and limitations must receive separate Department of the Army authorization.

Activities authorized under this regional permit do not require additional authorization under the provisions contained in 33 CFR 325, Regulatory Programs of the Corps of Engineers, unless the District Engineer determines on a case-by-case basis that additional review is in the public interest.

This regional permit **does not authorize** impoundment construction in the following areas:

a. Areas of documented, confirmed, or potential use by anadromous fish, including spawning areas. For further information on the location of these areas, contact the Virginia Department of Game and Inland Fisheries or the National Marine Fisheries Service.

- b. Wetland areas composed of 10% or more of the following species (singly or in combination) in any stratum: Atlantic white cedar, bald cypress, water tupelo, or overcup oak.
- c. Wetland areas underlain by histosols. Histosols are organic soils that are often called mucks, peats, mucky peats, etc. The list of histosols in Virginia includes but is not limited to the following soil series: Back Bay, Belhaven, Dorovan, Lanexa, Mattamuskeet, Mattan, Palms, Pamlico, Pocaty, Pungo, and Rappahannock.
- d. Watersheds larger than 2 square miles (1280 acres).
- e. In third order streams or greater.

The following activities may qualify for this regional permit, but may also require a separate Virginia Water Protection Permit from DEQ:

- a. Proposals located in a perennial stream or in isolated wetlands (wetlands without a surface connection to other waters of the United States).
- b. Annual water withdrawals for irrigation from authorized impoundments must be less than (7.5 X DA) acre-inches per year, where DA equals the drainage area of the pond in acres. This formula allows the farmer to take on average up to half the water that comes off that drainage for irrigation purposes.
- c. Anyone withdrawing more than 1 million gallons of water in any single month for irrigation purposes is required to report water use to the Virginia Department of Environmental Quality (DEQ) under the Water Use Registration Regulation (9 VAC 25 200). Users from ponds on intermittent streams as defined by broken blue lines on U.S. Geological Survey 7.5 minute series topographic maps are not required to report consumption unless the ponds are excavated ponds which intercept the groundwater table and thus contain groundwater. A reporting form may be obtained from DEQ by calling (804) 698-4461.

Specific Activities Authorized.

The discharge of dredged or fill material associated with the conversion of non-tidal waters of the United States, including wetlands, to small impoundments. Impacts to waters of the United States, including adjacent wetlands, will be considered cumulatively for each project or tract.

1. Construction of impoundments that impact by filling, flooding, draining, or clearing no more than 1/10 acre of non-tidal waters of the United States, including wetlands, and no more than 300 linear feet of the stream (as measured upstream from the impoundment structure) will not require notification to the Corps, provided the special and general conditions are met, including the following special conditions:

- (a) The proponent has documentation indicating that the proposed work will not affect federally proposed or listed threatened and endangered species or proposed or

designated critical habitat. Documentation should include correspondence from the U.S. Fish and Wildlife Service or the local field office of the Corps of Engineers having jurisdiction over the proposed project, indicating the proposed work will not affect any federally-listed species or federally designated critical habitat.

(b) Notification of the Corps is required for work in trout waters and/or designated critical habitat or natural heritage resources areas as specified in Special Conditions 1-3, below (pages 2 and 3 of this permit).

(c) The Corps of Engineers and Virginia Department of Environmental Quality (DEQ) are notified within 30 days of completion of pond construction using the attached form.

2. Construction of impoundments that impact by filling, flooding, draining, or clearing greater than 1/10 acre and less than or equal to 1/2 acre of non tidal waters and wetlands, and no more than 1500 linear feet of the stream (as measured upstream from the impoundment structure), will require notification to the Corps prior to initiating construction. These activities may have a minimal effect provided compensatory mitigation is provided to offset the unavoidable impacts to waters of the U.S., including wetlands. (see special condition 2 f. pages 3, below).

3. Construction of impoundments that impact more than 1/2 acre of non-tidal waters and wetlands and/or more than 1500 linear feet of channel (as measured upstream from the impoundment structure) require an individual Department of the Army permit, or SPGP, and are not authorized under this regional permit.

Special Conditions

1. Notification, as described in Special Condition 2 (below), for impacts in certain Trout waters, critical habitat, or natural heritage resource areas, to the appropriate Corps of Engineers field office (see the attached map with addresses and telephone numbers) is required for activities occurring in:

a. Two categories of Trout waters; (Stockable Trout Waters and Natural Trout Waters, as defined by the Virginia Department of Environmental Quality's Water Quality Standards (9VAC25-260-00 et seq.), dated December 10, 1997, or the most recent updated publication. Activities proposed in trout waters in the following river basins:

1. Potomac-Shenandoah
2. James
3. Roanoke
4. New
5. Tennessee and Big Sandy
6. Rappahannock

The counties in which this notification requirements applies include:

Albemarle	Franklin	Rappahannock
Alleghany	Frederick	Roanoke

Amherst	Giles	Rockbridge
Augusta	Grayson	Rockingham
Bath	Greene	Russell
Bedford	Henry	Scott
Bland	Highland	Shenandoah
Botetourt	Lee	Smyth
Buchanan	Madison	Washington
Carroll	Montgomery	Warren
Clarke	Nelson	Wise
Craig	Page	Wythe
Dickenson	Patrick	
Floyd	Pulaski	

The Corps will coordinate the notification with the DEQ and the Virginia Department of Game and Inland Fisheries (VDGIF). VDGIF's and DEQ's comments will be fully considered before the Corps makes a final decision on the project.

B. The main channel and tributaries of waters of the United States, including their adjacent wetlands, within or upstream of the following waters:

Powell River: From the Virginia State Line to the Route 58 Bridge in Big Stone Gap and one mile upstream of the mouth of any tributary adjacent to this portion of the River.

Clinch River: From the Virginia/Tennessee State Line upstream to Route 632 at Pisgah in Tazewell County, Virginia and one mile upstream of the mouth of any tributary adjacent to this portion of the River, the Little River to its confluence with Maiden Spring Creek and one mile upstream of the mouth of any tributary adjacent to this portion of Little River.

Indian Creek: From its confluence with the Clinch River upstream to the fourth Norfolk and Western Railroad bridge at Van Dyke in Tazewell County and one mile upstream of the mouth of any tributary adjacent to this portion of the Creek.

Copper Creek: From its confluence with the Clinch River to the Route 58 Bridge at Dickensonville in Russell County and one mile upstream of the mouth of any tributary adjacent to this portion of the Creek.

North Fork Holston River: From the Virginia State Line to the Smyth County/Bland County line and one mile upstream and one mile upstream of the mouth of any tributary adjacent to this portion of the River.

Middle Fork Holston River: From the Virginia State Line to the confluence of Walker Creek in Smyth County near Marion, Virginia.

South Fork Holston River: From the confluence of the Middle Fork Holston River upstream to the confluence of Beech Creek in Washington County.

Any stream or wetland that an authorized activity may affect federally designated critical or proposed critical habitat or a federally listed or proposed threatened or endangered species.

If the Corps determines that any of the areas or species described in this section may be affected, it will initiate consultation with the United States Fish and Wildlife Service pursuant to Section 7 of the Endangered Species Act in accordance with General Condition 3 (below). The applicant cannot begin work in jurisdictional waters or wetlands until the Corps provides written notification that such work may proceed and includes any project specific special conditions concerning federally listed species.

c. The following waters and natural heritage resource areas.

Naturally occurring basins or depressions that normally contain standing water seasonally or permanently, (e.g., Delmarva/Carolina Bays, sinkhole ponds, vernal ponds, etc.);

Perennial streams;

Wetlands driven by discharges from the water table in the coastal plain (i.e. seeps); and sphagnum-dominated wetlands;

High alkaline marshes in calcareous substrate. There are a number of different wetland community types that fall into this category, and no single set of indicator species. For instance, the grass/sedge dominated wet prairies of the Shenandoah Valley have several characteristic sedges, including the state-rare *Carex lacustris* (lake-bank sedge) and the more common *Carex lanuginosa* (woolly sedge) and *Carex trichocarpa* (hairy-fruit sedge). Another example is calcareous seeps, which are often "crunchy" under foot. This crunch is caused by a whitish, clay-like material known as travertine-marl that can cover the ground surface. Marl is a calcium carbonate precipitate formed when the seepage water is warmed and agitated along its course down a slope;

NOTE: Corps regulatory jurisdiction over isolated waters and isolated wetlands is limited by and subject to the holdings of the ***U.S. Supreme Court in the Case of Solid Waste Authority of Northern Cook County vs. U.S. Army Corps of Engineers, No. 99-1178 ("SWANCC decision")***.

2. Notification for impoundments impacting between greater than 1/10 acre and 1/2 acre of non-tidal waters of the United States, including wetlands, and up to 1500 linear feet of stream channel must be submitted to the Corps prior to initiating construction. This Pre-Construction Notification (PCN) must be in writing (the standard Joint Permit Application may also be used) and include the following information:

a. Name, address and telephone number of the project proponent;

b. Location of the area to be converted to agricultural production (including Tract and Farm Numbers if available);

- c. Vicinity map (preferably USGS Quadrangle map), aerial photograph, or drawing accurately showing the extent of the area to be converted to agricultural production and the extent of waters of the U.S., including wetlands;
- d. Brief description of the proposed project, its purpose, and its direct and indirect adverse environmental effects;
- e. A delineation/determination of the extent of the waters and wetland areas on the tract is required. The Corps recommends characterizing the water and wetland resources using the Cowardin Classification System Mapping Conventions (e.g., PF0, PEM, POW, etc.)
- f. A proposal to mitigate for unavoidable impacts to waters of the U.S., including wetlands. The types of mitigation options that should be considered include, but are not limited to the following:
 - (1) livestock exclusion with buffers and fencing;
 - (2) wetland restoration and creation;
 - (3) stream restoration and bioengineering;
 - (4) riparian preservation through restrictive covenants;
 - (5) buffers;
 - (6) purchases of credits from approved wetland mitigation banks; and
 - (7) voluntary contributions to trust funds approved by the Norfolk District.

To the extent practicable, wetland mitigation should be in-kind and on-site (i.e., forested wetlands for forested wetlands). Options 2-7 may not satisfy mitigation requirements for other federal or state programs, or for projects requiring an Corps individual permit or SPGP.

g. Any conversions involving U.S. Department of Agriculture program participants must be coordinated with NRCS prior to commencing conversion.

h. Information on any prior use of this regional permit (RP-5) on the same tract or property.

3. This regional permit does not authorize placement of waste treatment lagoons in waters of the U.S.

4. For the purposes of this regional permit, the impacted area of waters of the United States includes the wetlands, streams, and other waters of the United States that are permanently filled, flooded, cleared, or drained as a result of the regulated activity.

5. When all required information is received by the appropriate Corps office (see attached map), the Corps will notify the project proponent within 45 days whether the project can proceed under the regional permit or whether an individual permit is required. If, after reviewing the notification, the District Engineer determines that the proposed activity would have more than minimal individual or cumulative adverse impacts on the aquatic environment or otherwise may be contrary to the public interest,

then he will either condition the regional permit authorization to reduce or eliminate the adverse impacts, or notify the project proponent that the activity is not authorized by the regional permit and provide with instructions on how to seek authorization under an individual permit. If the proponent is not notified otherwise within the 45-day period the proponent may begin the activity provided all other applicable federal and state program requirements have been met. Subsequently, the permittee's right to proceed under this regional permit may be modified, suspended, or revoked only in accordance with the procedures set forth in 33 CFR 325.7.

6. When this regional permit is used in conjunction with any Corps nationwide permit or any other Norfolk District regional permit, if the cumulative loss of non-tidal waters, including non-tidal wetlands exceeds 1/10 acre per tract, then submission of a Pre-Conversion Notification (PCN) will be required. If the combined permanent loss of waters and wetlands would exceed 1/2 acre and/or 1500 linear feet of the main stream channel, an individual Department of the Army permit, or SPGP will be required.

7. For irrigation facilities, a description of the extent of the area to be irrigated and the amount of water storage volume required must be provided.

8. For livestock watering facilities, a description of the type of farming operation, herd size and pasture acreage to be served by this facility must be provided.

9. The temporary placement or double handling of excavated or fill material in wetlands or channelward of ordinary high water elevation is not authorized by this regional permit.

10. Any temporary fills in waters or wetlands must be removed in their entirety and the affected areas returned to their pre-existing elevation.

General Conditions:

1. A Certificate of Compliance must be completed and a copy retained for your records. The original Certificate of Compliance shall be mailed to, U. S. Army Corps of Engineers, Regulatory Branch, 803 Front Street, Norfolk, Virginia 23510-1096 within 30 days of completion of the project. The statement will include the following:

- a. The authorized work has been performed in accordance with the Corps' authorization;
 - b. A statement that any required mitigation has been completed in accordance with the permit conditions; and
 - c. The signature of the permittee, certifying the completion of the work and mitigation.
2. A copy of this permit and any verification letter must be provided to the contractor and made available at the project site to any regulatory representative.

3. (a) No activity is authorized under this permit which is likely to jeopardize the continued existence of a threatened or endangered species or a species proposed for such designation, as identified under the Federal Endangered Species Act, or which is likely to destroy or adversely modify the critical habitat of such species. Non-federal permittees shall notify the Norfolk District if any listed species or critical habitat might be affected or is in the vicinity of the project and shall not begin work until notified by the district engineer that the requirements of the Endangered Species Act have been satisfied and that the activity is authorized.

(b) Authorization of an activity by a this permit does not authorize the “take” of a threatened or endangered species as defined under the Federal Endangered Species Act. In the absence of separate authorization (e.g. an ESA Section 10 Permit, a Biological Opinion with “incidental take” provisions, etc.) from the U.S. Fish and Wildlife Service or the National Marine Fisheries Service, both lethal and non-lethal “takes” of protected species are in violation of the Endangered Species Act. Information on the location of threatened and endangered species and their critical habitat can be obtained from the U.S. Fish and Wildlife Service and National Marine Fisheries Service or their world web pages at <http://www.fws.gov/~r9endspp/endspp.html> and http://kingfish.spp.mnfs.gov/tmcintyr/prot_res.html#ES and recovery, respectively.

4. No activity which may affect historic properties listed, or eligible for listing, in the National Register of Historic Places is authorized until the Norfolk District has complied with the provisions of 33 CFR 325, Appendix C. The prospective permittee must notify the Norfolk District if the authorized activity may affect any historic properties listed, determined to be eligible, or which the prospective permittee has reason to believe may be eligible for listing on the National Register of Historic Places, and shall not begin the activity until notified by the Norfolk District that the requirements of the National Historic Preservation Act have been satisfied and that the activity is authorized. Information on the location and existence of historic resources can be obtained from the Virginia Department of Historic Resources and the National Register of Historic Places, or the Corps of Engineers.

5. If you discover any previously unknown historic or archeological remains while accomplishing the activity authorized by this permit, you must immediately notify the Norfolk District of what you have found. We will initiate the Federal and state coordination required to determine if the remains warrant a recovery effort or if the site is eligible for listing in the National Register of Historic Places.

6. Permittees are expected to fully comply with Virginia Administrative Code 9 VAC 25-260-10, Water Quality Standards and all other appropriate laws and regulations of the Commonwealth of Virginia pertaining to water quality.

7. Navigation: No activity may cause more than a minimal adverse effect on navigation.

8. Proper Maintenance: Any structure or fill authorized shall be properly maintained, including maintenance to ensure public safety.

9. Soil Erosion and Sediment Controls: Appropriate erosion and sediment controls must be used and maintained in effective operating condition during construction, and all exposed soil and other fills, as well as any work below the ordinary high water mark, must be permanently stabilized at the earliest practicable date.
10. Aquatic Life Movements: No activity may substantially disrupt the movement of those species of aquatic life indigenous to the waterbody, including those species which normally migrate through the area, unless the activity's primary purpose is to impound water. Culverts placed in streams must be installed to maintain low flow conditions.
11. Equipment: Heavy equipment working in wetlands must be placed on mats or other measures must be taken to minimize soil disturbance.
12. Water Supply Intakes: No discharge of dredged or fill material may occur in the proximity of a public water supply intake.
13. Suitable Material: No discharge of dredged or fill material may consist of unsuitable material (e.g.: trash, debris, car bodies, asphalt, etc.) and material discharged must be free from toxic pollutants in toxic amounts (see Section 307 of the Clean Water Act).
14. Obstruction of High Flows: To the maximum extent practicable, discharges must not permanently restrict or impede the passage of normal or expected high flows or cause the relocation of the water.
15. Adverse Effect From Impoundments: If the discharge creates an impoundment of water, adverse impacts on the aquatic system caused by the accelerated passage of water and/or the restriction of its flow shall be minimized to the maximum extent practicable.
16. Waterfowl Breeding Areas: Activities, including structures and work in navigable waters of the United States or discharges of dredged or fill material, into breeding areas for migratory waterfowl must be avoided to the maximum extent practicable.
17. The permittee will make every reasonable effort to conduct the construction or operation of the work authorized by this permit in a manner so as to minimize any adverse impact on fish, wildlife and natural environmental values.
18. Tribal Rights: No activity or its operation may impair reserved tribal rights, including, but not limited to, reserved water rights and treaty fishing and hunting rights
19. Authorized activities must comply with Executive Order 12898, "Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations".
20. The permittee shall allow the District Engineer or his authorized representative(s) or designee(s) to make periodic inspections at any time deemed necessary in order to assure that the activity being performed under authority of this permit is in accordance with the terms and conditions prescribed herein.

21. Failure to comply with the terms and conditions of this permit can result in enforcement actions against the permittee and/or contractor.
22. The provisions of this permit shall be binding on any assignee or successor in interest of the permittee.
23. In order to transfer this permit, the transferee must supply the Norfolk District with a written request to transfer the permit.
24. Should you be unable to complete the authorized activity in the time limit provided, you must submit your request for a time extension to this office for consideration at least one month before the permit expiration date.
25. In granting an authorization pursuant to this permit, the Norfolk District has relied on the information and data provided by the permittee. If, subsequent to notification by the Corps that a project qualifies for this permit, such information and data prove to be materially false or materially incomplete, the authorization may be suspended or revoked, in whole or in part, and/or the Government may institute appropriate legal proceedings.
26. Limits of this authorization:
- a. This permit does not obviate the need to obtain other Federal, state or local authorizations required by law.
 - b. This permit does not grant any property rights or exclusive privileges.
 - c. This permit does not authorize any injury to the property or rights of others.
 - d. This permit does not authorize interference with any existing or proposed Federal projects.
 - e. This permit does not grant any Corps real estate rights. If real estate rights are needed from the Corps, please contact Norfolk District's Real Estate Division at the address listed on the front page or telephone (757) 441-7735.
27. In issuing this permit, the Federal Government does not assume any liability for the following:
- a. Damages to the permitted project or uses thereof as a result of other permitted or unpermitted activities or from natural causes.
 - b. Damages to the permitted project or uses thereof as a result of current or future activities undertaken by or on behalf of the United States in the public interest.
 - c. Damages to persons, property, or to other permitted or unpermitted activities or structures caused by the activity authorized by this permit.
 - d. Design or construction deficiencies associated with the permitted work.
 - e. Damage claims associated with any future modification, suspension, or revocation of this permit.
28. The Norfolk District may reevaluate its decision on your authorization under this permit at any time the circumstances warrant. Circumstances that could require a reevaluation include, but are not limited to, the following:
- a. You fail to comply with the terms and conditions of this permit.

- b. The information provided by you in support of your permit application proves to have been false, incomplete, or inaccurate (See 20 above).
- c. Significant new information surfaces which this office did not consider in reaching the original decision. Such a reevaluation may result in a determination that it is appropriate to use the suspension, modification, and revocation procedures contained in 33 CFR 325.7 or enforcement procedures such as those contained in 33 CFR 326.4 and 326.5. The referenced enforcement procedures provide for the issuance of an administrative order requiring you to comply with the terms and conditions of your permit and for the initiation of legal action where appropriate. You will be required to pay for any corrective measures ordered by this office, and if you fail to comply with such directive, this office may in certain situations (such as those specified in 33 CFR 209.170) accomplish the corrective measures by contract or otherwise and bill you for the cost. In addition, unpermitted work or violation of permit conditions may result in civil, criminal or administrative penalties (33 U.S.C. 406).

29. This regional permit, unless further modified, suspended or revoked, will be in effect until June 1, 2010. Upon expiration, it may be considered for revalidation.

Date

Yvonne J. Prettyman-Beck
Colonel, Corps of Engineers
District Engineer